3. Many Broadcasters Abandoned Antidiscrimination Protections After The EEO Rule Was Suspended

As shown above, the industry has engaged in widespread discrimination, As the Commission knew when it adopted the EEO rules in 1969 and 1971, the industry discriminated relentlessly when there were no EEO rules. 50/ Should we now assume that discrimination ended because the EEO rules were suspended?

Do accidents stop happening because the city stops repairing roads and installing stop signs?

This illogic did not stop the STBAs from asserting that civil rights organizations "rely on distant history rather than current reality" in urging that continued EEO regulation is necessary. 51/ Specifically, the STBAs maintain that EEO regulations are unnecessary because the industry has not started to discriminate over the past three years. 52/ No evidence is offered for this startling assertion, -- and as discussed infra, the STBAs and the NAB want to eliminate, or restrict access to, the very data that could illuminate this question. 53/

50/ A horrible example was provided by the renowned San Francisco television anchor, Belva Davis, at the June 24, 2002 en banc hearing. In 1965, a year after Title VII was enacted, Ms. Davis "applied for an open position at the ABC O&O in San Francisco where civil rights leaders had been pressuring them to hire a person of color. I finally got my interview with the manager...who at the time was a very nice man, very friendly. I waited more than two hours, though, to see him, and I knew I was in trouble. At the end of my short time he said to me I want to thank you very much, but we are not hiring negresses yet. If we ever do, I will certainly keep you in mind." Testimony of Belva Davis, Tr. 86-87.

51/ STBAs Reply Comments, p. 6. To be sure, there has been some progress, but it is far too early to declare victory. As the Blumrosens point out, "[o]ne reality reflected in the EEO-1 data is the improvement in opportunities for minorities and women wince the sixties when they were cramped into a limited range of jobs and denied opportunities to develop and demonstrate their abilities and earn appropriate compensation. This reality may have influenced the erroneous impressions of all groups concerning the proportions of minorities in the country, and their position in the job market." Blumrosens Study, p. 20.

52/ Id.

53/ See discussion at pp. 27-32 infra.

Furthermore, the STBAs, who profess not to like "pressure" by those fighting discrimination, threaten to seek "statutory or constitutional scrutiny and rejection" if meaningful EEO rules are restored. 54/

This stance is at least puzzling. If the STBAs are so supremely confident there is no longer any discrimination, they should have no reason to fear citizens who bring discrimination allegations to the Commission. Following their logic, no such case would have any merit anyway, so no such litigant could ever prevail. Yet they are fighting as though their lives depend on it to prevent anyone from having evidence that could be used in support of a discrimination case. 55/

This is how Texas Association of Broadcasters (TAB) Executive Director Ann Arnold articulates the STBAs' position:

> The broadcast industry lived three decades under FCC administered nondiscrimination and affirmative action rules. For all practical purposes, those affirmative action or broad outreach rules have been off the books for three years now without any evidence of radio and television stations acting to curtail equal employment opportunity for all or to discriminate against any minorities. The broadcast industry continues to reach out for qualified employees from the entire population. Outreach efforts have in essence become institutionalized, and we question why anyone would assert that there is any true need for any industry wide re-regulation in this area. 56/

Similarly, the NAB asserts that the "EEO rules have been in effect for more than 30 years. Absent any evidence to the contrary, these policies must be presumed to have been successful[.]" 57/

It would certainly be delightful if a regulation could be "presumed" to be successful simply because it has been in effect for three decades. Sometimes, even less time is required. Bus segregation and airline segregation were prohibited in 1955 and 1956 respectively, and these practices were virtually stamped out

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54/ Id., p. 7.

55/ See STBAs Reply Comments, p. 29 (continuing to argue that Form 395 data should not be made available to the public, which might use it to file discrimination cases.)

56/ Testimony of Ann Arnold, Executive Director, Texas Association of Broadcasters, Tr. 41.

57/ NAB Reply Comments, p. 18.

in a matter of months. However, we have had laws against employment and housing discrimination for nearly four decades; we have had laws against drug importation and use for thirteen decades; we have had laws against speeding for nine decades; and we (and the English) have had laws against homicide for 94 decades. These laws have been (per Jimmy Carter's famous phrase) at best an "incomplete success" in eliminating the harms they seek to cure. Certainly the Commission's EEO rules would be more successful if the broadcast industries' trade organizations would fight -- as the NCTA has -- for enforceable rules and for strong enforcement of those rules.

To be sure, many broadcast companies and cable companies continued to practice broad recruitment even when they were no longer required to do so. Among broadcasters, for example, it is the policy of the CBS, UPN, NBC, ABC and Fox station groups, and of Clear Channel, Gannett, Cox, Radio One, Spanish Broadcasting System, Hispanic Broadcasting and Emmis -- and others -- to continue to use nondiscriminatory procedures and to maintain vigilance against discrimination. 58/

It is not surprising that large, successful companies observe EEO procedures even when their licenses are not at risk, and even while no one is looking. Nondiscrimination and discrimination-prevention are earmarks of a successful business. Discrimination impedes a company's competitiveness, since a discriminator is not receiving the full benefit of all sources of labor. 59/

The large broadcast companies that observe EEO procedures own fewer than half of the nation's broadcast stations. We have recently seen how many other stations misbehave. As we reported in

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58/ We take this opportunity to mention one of them -- Midwest Family Broadcasters. Its Vice President, Mary Ann Kushak, was the NAB's witness at the June 24 en banc hearing. Ms. Kushak testified that "I have never witnessed or experienced discrimination against anyone." Tr. 33. Some of our colleagues have advised us that they found her testimony incredible, but we disagree. In a company that finds discrimination abhorrent, it is entirely plausible that an executive would never encounter any discrimination. Regrettably, not everyone in the industry has been as fortunate as Ms. Kushak in having enjoyed the opportunity to work in a discrimination-free environment.

59/ See EEO Supporters Comments, pp. 24-29. A recent example of how greater inclusion promotes competition is found in the effect of Title IX on sports. Ellen Goodman points out that "[s]ince the law was passed, the number of men's teams has gone up, not down. So has the number of men in intercollegiate play. More than 70 percent of the schools that added women's teams did it without cutting men's teams."

our Reply Comments, 42% of broadcast job postings on state association websites no longer include the three letters "EOE" which for four decades have served as American industry's universal signal to job-seekers that they can expect nondiscriminatory treatment by employers. 60/

We expected the STBAs to have an explanation for their own members' wholesale deletions of "EOE" tags on job notices published on the state associations' own websites -- and for so many of their own websites' failure to include an EOE statement. But the STBAs are completely silent in the face of evidence that they and almost half of their own members are "backsliding" in droves. There is no defense for the disgraceful practice of deleting EOE tags from job notices.

Broadcasters' wholesale deletion of EOE tags was hardly the only evidence of industry backsliding. Extensive evidence of industry backsliding -- and continued lack of progress that predates 1999 -- has already been provided in our Comments and Reply Comments. 61/ In addition:

> The NAMIC study Minority Employment in Cable II, an update of NAMIC's 1999 study discussed in our earlier Comments, 62/ found that minority representation in management now stands at 15%, but among CEOs and members of corporate boards it is only 7%. The study found that "minorities remain underrepresented across all cable management positions" and that Hispanics are "severely underrepresented" in key management positions at 1% at MSOs and other cable companies, although they make up 12.6% of the population. 63/

60/ See EEO Supporters Reply Comments of EEO Supporters, filed May 29, 2002 ("EEO Supporters Reply Comments"), pp. 28-31.

61/ EEO Supporters Comments, pp. 47-49; EEO Supporters Reply Comments, pp. 19-35.

62/ See EEO Supporters Comments, pp. 37-38 n. 107. The 1999 NAMIC study reported, among other things, that 21% of minorities and 22% of women perceived that their race or gender, respectively, had a negative impact on opportunities at their companies. Id. In light of the Blumrosens Study (which found that 19% of cable companies discriminated against women, 36% against African Americans and 21% against Hispanics) the perceptions by women in cable were almost exactly on the mark. Minorities significantly underestimated the discrimination actually visited upon them. See p. 13 supra.

63/ See "Cable Needs More Minorities, Especially Hispanics, Study Says," Communications Daily, September 24, 2002, pp. 3-4.

The September, 2002 issue of Talkers magazine just rated the top 25 radio talk show hosts of all time, based on "talent, longevity, success, creativity, originality and impact on both the broadcasting industry and society in general." The New York Daily News reported that "the list may reinforce the image of talk radio as the land of white males, because 22 of the top 25 are males and all 25 are white." 64/

The UCLA Center for Chicano Studies report, "Ready for Prime Time: Minorities on Network Entertainment Television" found that "[d]espite the well-documented growth of racial minorities as a demographic, political, and market force within the United States, this population enters the twenty-first century with a lower level of media access and representation than since the civil rights era." 65/ The study documents the continued and abysmally low representation of minorities as television actors, directors, writers and network executives. A copy of the study is provided as Exhibit 2 to this letter.

The RTNDA's 2002 Women and Minorities Survey showed that while the representation of women and minorities among TV news directors is increasing, the representation of minorities in the TV news workforce slid back from 24.6% last year to 20.6%. 66/ The study, with accompanying commentary, is provided as Exhibit 3 to this letter.

A study by the Most Influential Women in Radio ("MIW"), released August 7, 2002, found that opportunities for women in radio are "still far below the management opportunities for men." In particular, the representation of women among general managers has not increased from last year, and the percentage of stations with female general sales managers has actually decreased during this past year. 67/

64/ David Hinckley, "Who's Tops in Talk," New York Daily News (reprinted in Shoptalk, September 20, 2002, p. 7).

65/ Chon A. Noriega, "Ready for Prime Time: Minorities on Network Entertainment Television," UCLA Chicano Studies Research Center, May, 2002, p. 1.

66/ Radio-Television News Directors Association and Foundation, "RTNDA 2002 Women & Minorities Survey" (2002).

67/ See Most Influential Women in Radio, "Annual Gender Analysis" (August 7, 2002), available at www.radiomiw.com/pr_cmfl/pr_020808.cfm (analyzing M Street Trend Report on the status of women managers in the radio industry).

An Annenberg Public Policy Report, "Women Fail To Crack the Glass Ceiling in Communication Companies" concluded that fewer than one in five board members of the largest communications companies are women. 68/ The report found that among the presidents and CEOs of over 120 broadcast television and cable networks, only 165% are women, and only one in five heads of local television stations and cable systems are women. 69/ Former Commissioner Susan Ness of the Annenberg Center commented that "[w]ith few exceptions, we have not moved beyond tokenism in the number of women in top leadership positions or serving on the boards of communications companies." 70/

This evidence points to what should be obvious: the suspension of EEO rules did not miraculously bring about the full inclusion of minorities and women in broadcasting and cable.

4. Recruitment For Each Vacancy Is Hardly "Fruitless"

In its Reply Comments, the NAB makes the surprising assertion that "job-specific recruitment" is "typically fruitless" and, that "broad, general outreach almost always yields a better pool of available candidates[.]" 71/

If job-specific recruitment is such a waste of time, why have broadcasters bothered, for seven decades, to put notices for specific positions on their bulletin boards, in trade publications, and in daily newspapers? Why do they bother putting these job vacancy announcements on their own websites?

Like other businesspeople, broadcasters cannot possibly know of the existence and availability of every qualified person for every vacancy. No broadcaster can risk hiring a weak job candidate; thus, almost no broadcasters draw only their often-stale resume files when a new job is open. Instead, broadcasters recruit to determine who is immediately available. And when they recruit, the Commission ought to expect them to recruit broadly enough to reach the entire community.

68/ See Annenberg Public Policy Center, "The Glass Ceiling in the Executive Suite: The Second Annual APPC Analysis of Women Leaders in Communication Companies," p. 4 (2002) ("Glass Ceiling Report"), available at www.appcpenn.org.

69/ Annenberg Public Policy Center, "Women Fail to Crack the Glass Ceiling in Communication Companies (August 27, 2002), available at www.appcpenn.org.

70/ Glass Ceiling Report, supra, p. 4.

71/ NAB Reply Comments, p. 5.

While some nonprofit organizations have a difficult time finding qualified people to refer for job openings, other nonprofit organizations are quite adept at identifying good candidates that broadcasters might not otherwise locate. For example, there is hardly an Urban League chapter in the United States that does not successfully place qualified minorities in broadcasting jobs.

Nonetheless, the STBAs object to the use of what they call "intermediaries" or "middlemen" to help spread the word that jobs are available. The kind of "middlemen" the STBAs do not want to use are "minority-owned contractors or focused nonprofit organizations." 72/ Specifically, the STBAs wonder who will "regulate" these groups, control their "rates" and the like. 73/

This objection is an insult to the thousands of nonprofit organizations, such as local units of the Urban League, the NAACP, LULAC and NOW, as well as churches and colleges, who for thirty years have worked for free to help broadcasters find qualified applicants, including minorities and women. No one has suggested that broadcasters should be required to pay anyone for a service they almost always can and do receive for free.

5. Broadcast Hiring Is An "Insular" Process

The NAB takes issue with the Comments of AFTRA, and others, who asserted that broadcast hiring is often insular and conducted by word of mouth from a homogeneous control group. 74/ However, dozens of Commission decisions have held that stations failed to recruit broadly enough to reach minorities or women. 75/ This is hardly a trivial issue, since "[u]nder appropriate circumstances such 'word of mouth' recruiting may violate Title VII because it unreasonably restricts job information." 76/

72/ STBAs Reply Comments, pp. 22-23 (discussing Comments of the NAACP, filed April 15, 2002, p. 3.)

73/ STBAs Reply Comments, p. 23.

74/ NAB Reply Comments at 14-15.

75/ A Lexis search found 35 of these decisions by the Commission issued over the past ten years. This search did not include Bureau orders, and of course it did not take account of any of the thousands of stations whose recruitment practices were not called to account by a petitioner to deny.

76/ Blumrosens Study, p. 65. See Alfred W. Blumrosen, "The Duty of Fair Recruitment Under the Civil Rights Act of 1964, 22 Rutgers L. Rev. 465 (19860), reprinted, A.W. Blumrosen, Black Employment and the Law, 218-295 Rutgers University Press (1971).

The en banc hearing testimony of, inter alia, Hugh Price, Joan Gerberding, Cathy Hughes and Charles Warfield shows that much broadcast hiring takes place through insular networks. 77/ Furthermore, here is what some of the witnesses in the 1999 EEO proceeding had to say about word of mouth recruiting:

> W. Don Cornwell: [W]ord-of-mouth recruitment is very significant in the broadcast industry. Intern and part-time positions are many times filled through in-house referrals and when full time positions become available, these "known" workers typically lead the recruitment list. Thus, if a company is not ethnically diverse at the outset, the word-of-mouth process can be detrimental to minorities seeking the full time jobs. 78/
>
> Russell Perry: The good-old-boy network is working, as usual, but it's working with a FCC-driven monitoring force. Without policing, employment opportunities would not exist for minorities and women. The industry has not encouraged minorities to apply for existing employment opportunities. 79/
>
> Pearl Murphy: It has been very rare for our graduates to secure employment at stations that have not bothered to recruit them, because our students are not part of the old boy network. They have no way to know when a position becomes available, unless they learn of the opening because the company recruited with us. 80/

77/ See p. 11 supra.

78/ Statement of W. Don Cornwell, Chairman and CEO, Granite Broadcasting Corporation, New York City, in Comments of EEO Supporters, MM Docket No. 98-204 (Broadcast and Cable EEO Rules), filed March 5, 1999, Vol. III, Exhibit 3 ("EEO Supporters 1999 Comments").

79/ Statement of Russell Perry, CEO, Perry Publishing and Broadcasting Company, Inc., Oklahoma City, OK, in EEO Supporters 1999 Comments, Vol. III, Exhibit 17.

80/ Statement of Sharon Pearl Murphy, Executive Director, African American Media Incubator, Washington, D.C., in EEO Supporters 1999 Comments, Vol. III, Exhibit 15.

Veronica Cruz: There is not an easy flow of information about opportunities for different minority groups. Often they are isolated by their cultural background and their schools. The EEO policy is important for its impact on programming offered by stations and for providing minorities with knowledge of entry level positions for which they are qualified. It has, to some extent reduced the reliance of word-of-mouth recruiting. 81/

Joe Madison: The lack of aggressive enforcement has impeded opportunities for minorities. Furthermore it has failed to reduce excessive reliance on old boys network which permeate the broadcasting culture. Indeed individuals with no experience are given on-air, prime positions in key time slots (two prominent, examples are Oliver North, (WRC), Danny McLain (WXYT, Detroit) over and above African-American, Hispanic or other minorities who have been working at stations in designated weekend slots for years. The EEO policy helps to attract the best talent in a particular community, and not just the better connected. It provides opportunities for those who have not gained access to what has been essentially a word-of-mouth, closed community. 82/

Tom Castro: Most positions get filled so fast, that if a person does not know someone in the industry, without the outreach efforts, including notification, you are never going to find out about job openings. A promising person who is known by somebody, who knows the decision-makers, usually fills entry-level positions....Without this enforcement, I fear there would be a reversion to good old boy network....in the 90's, the word has filtered through to young people that if they don't know someone in the industry, it is back to the way it used to be. 83/

81/ Statement of Veronica Cruz Executive Director, African American Media Incubator, Washington, D.C., in EEO Supporters 1999 Comments, Vol. III, Exhibit 4.

82/ Statement of Joe Madison, Program Director, WOL(AM), Lanham, MD; talk show host; former Director of Voting Rights, NAACP;. member, NAACP National Board of Directors, in EEO Supporters 1999 Comments, Vol. III, Exhibit 13.

83/ Statement of Thomas Castro, President, El Dorado Communications Corp., Houston, TX, in EEO Supporters 1999 Comments, Vol. III, Exhibit 2.

Finally, the NAB asserts that "insular recruitment is not necessarily unlawful or unwise." 84/ The NAB is correct in asserting that insular recruitment is not always unlawful; certainly a fully integrated control group, recruiting in an "insular" way will perpetuate an integrated workforce in the future. 85/ However, insular hiring is unwise, since it deprives the industry as a whole of the career potential of those not found within broadcasters' insular social and business networks.

6. Form 395 Should Not Be Addressed In This Proceeding; But If It Is, It Should Be Retained

Form 395 is not a discriminatory document -- like the Census, it neutrally records the presence of both genders and all races.

This benign research instrument has two purposes. Its primary purpose is to provide a barometer of the depth and nature of industrywide EEO performance, including industrywide discrimination. 86/

84/ NAB Reply Comments at 15.

85/ As we noted in our Comments, "'word-of-mouth' recruitment may continue if the broadcaster also attempts to reach those not within the usual word-of-mouth circle." EEO Supporters Comments, pp. 57-58 (emphasis in original).

86/ For a discussion of the usefulness of Form 395 data for industry analysis purposes, see the expert witness declaration of Drs. C. Ann Hollifield, Dwight E. Brooks and Lee B. Becker, University of Georgia, May 29, 2002 (Exhibit 1 to the Reply Comments of EEO Supporters).

Furthermore, as the federal courts have reiterated again and again, statistical evidence of the extent to which minorities and women were hired is certainly probative of whether the employer discriminated. 87/ In FCC cases, this evidence usually is invoked in mitigation. 88/ Thus, Form 395 has been noncontroversial for 30 years. Indeed the Commission is prohibited by Section 334 of the Act from eliminating it. 89/

Unfortunately, the NAB has put forth this patently excessive statement:

> The Annual EEO Public File Report and FCC Form 395-B serve no discernible purpose other than to assist third party interventions in license renewal/transfer proceedings. 90/

The NAB apparently means that publicly available information about broadcasters' EEO performance might help civil rights organizations evaluate and build upon their own incomplete knowledge of whether a broadcaster is violating the law, and seek redress with the FCC for such violations of law, The NAB thinks that is wrong.

87/ See, e.g., Shell Oil, supra, 466 U.S. at 80-91 (employment data helps the EEOC to "identify and eliminate systemic employment discrimination.") The Blumrosens Study is an outstanding example of the use of EEO-1 data to document systemic, intentional discrimination. Their methodology permits the use of this data with respect to individual employers as well.

88/ In EEO jurisprudence, including the Commission's EEO jurisprudence, Form 395 data is most commonly used by respondents, not complainants. Its most common use is to deflect allegations that the respondent discriminates. The STBAs and the NAB should consider the implication of their campaign against statistical data: if this data cannot be used to support a case of discrimination, it also cannot be used to defend against one.

89/ The NAB maintains that "Congress had no reason to enact the Section 334 provision barring revision of the employment forms without the existence of the EEO outreach provisions." NAB August 13 Letter, p. 4. This argument is addressed at length in the NOW et al. ex parte letter to Hon. Marlene H. Dortch, September 18, 2002, pp. 5-6. We subscribe to NOW et al.'s analysis.

90/ NAB EEO Views.

The NAB's statement reflects a deep and unfortunate shift in argument. Heretofore, the NAB has opposed EEO data gathering almost entirely on "burdensomeness" grounds. Now the NAB is actually opposing EEO data gathering expressly because EEO data could help rout out lawbreakers. The NAB has just crossed the line that divides the protection of its members' petty cash drawers from the concealment of its members' unlawful behavior. 91/

Citizen groups cannot use Form 395 to argue that "the station does not hire minorities; therefore, its recruitment efforts must be flawed." However, citizen groups should be able to use Form 395 to supplement an argument like this: "these three reliable witnesses state they have firsthand evidence of discrimination; furthermore, the station took down the "EOE" tags on its website, and one of our witnesses states that when she recently worked at the station, she counted heads and concluded that the station did not employ any minorities." In such a case, Form 395 ought to be available because it provides more accurate information. Broadcasters should prefer accuracy, where the alternative is the filing of petitions based on imperfect "head counts."

For their part, the SBTAs state that disclosure of Form 395 data is unconstitutional because "the Commission offers no promise in this Rule Making that it will not use station-attributable data reflecting the race, ethnicity and sex of employees when making EEO enforcement decisions." 92/ We trust that the Commission will

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91/ In their role as journalists, broadcasters usually take offense to proposals to restrict public access to information that could reveal unlawful behavior. The modern civil rights movement would have been impossible but for network television stations' dramatic, unbiased and unrelenting exposure of the apostles of segregation. See, e.g., Christopher Sterling and John Kittross, Stay Tuned: A History of American Broadcasting (2002 ed.), p. 447 (television "provided momentum for the civil rights movement of the 1960s, in news reports, documentaries, and other programming.") Evidently, the industry's journalistic initiative stops at the industry's own back alley.

92/ STBAs Reply Comments at 11. The STBAs also state that "MMTC has made it clear that it intends to use these reports to compare broadcasters' employee profiles with those of their local workforces." Id., p. 12. Leaving aside the fact that MMTC does not bring EEO adjudications, the statistical comparisons the STBAs refer to could not be introduced as evidence of the inadequacy of a recruitment plan. However, these statistical comparisons are exactly what courts require decisionmakers to consider in cases of intentional discrimination. These comparisons are hardly "unconstitutional pressure", any more than the ability to use this kind of data in an individual or systemic Title VII or Section 1983 case would be "unconstitutional pressure."

restate its often-expressed intention not to use this data to enforce the recruitment sections of the EEO rule. 93/ If the Commission breaks its promise, a broadcaster is free to bring an as-applied challenge in court.

It is at least theoretically possible that some poorly advised and ill informed broadcaster, somewhere, could infer from the Commission's consideration in this proceeding of Form 395 that Form 395 must have something to do with the enforcement of recruitment regulations. To counteract this obvious misimpression, we suggested that the Form 395 issue should be exported into a proceeding that is divorced from the recruitment issue. 94/ Industry associations ought to embrace our proposal, since it would eliminate confusion among their own members and erect an even thicker wall between Form 395 and any impermissible uses thereof -- which is exactly what they have been advocating.

Unfortunately, the STBAs have rejected our proposal to sever the Form 395 issue, saying that "[s]everance of this subject is like saying to the Commission: 'Let's only talk about what the rules should say and later we will discuss how they should be implemented and enforced.'" 95/ The STBAs' characterization is a 180-degree misstatement of our proposal, however. Our proposal is crafted precisely to eliminate even the erroneous appearance that the Commission would somehow intend to use Form 395 as part of the means by which the outreach rules "should be implemented and enforced." 96/

93/ The STBAs' analogy to the "unconstitutional pressure" found in Lutheran Church is flatly inapposite. See STBAs Reply Comments, p. 12. The Commission has repeatedly rejected this argument. See, e.g., Review of the Commissions Broadcast and Cable Equal Employment Opportunity Rules and Policies (First R&O), 15 FCC Rcd 2329, 2394-2400 ¶¶63-64 and ¶¶163-178 (2000), recon. and clarification granted in part, 15 FCC Rcd 22559 ¶¶37-39 (2000), reversed in part, MD/DC/DE Broadcasters, supra. In Lutheran Church, the Court was concerned that the Commission allegedly used a specific statistical test (colloquially, the "zone of reasonableness" or 50% of parity test) based on Form 395 data to decide whether or not to investigate the adequacy of recruitment practices. Here, the Commission does not propose to use this or any other statistical test to decide whether to investigate the adequacy of recruitment practices.

94/ See EEO Supporters Comments, pp. 135-136.

95/ STBAs Reply Comments, p. 29.

96/ Id.

The Commission might recall that in 2000, it acceded to the wishes of, inter alia, the Virginia and North Carolina state broadcast associations in creating "Option B" -- whose inclusion in the 2000 rules led to the remand in this case. The Commission should learn from this history and reject the STBAs' and NAB's invitations to address Form 395 in this proceeding. It is not difficult to predict what will happen if Form 395 is addressed in this proceeding: if the Commission rejects Form 395, the Commission will become the only government agency in the nation that refuses to recognize thirty years of precedent requiring the consideration of all evidence that corroborates -- or mitigates -- otherwise well founded allegations of intentional discrimination. But if the Commission retains Form 395 in this proceeding, it will have enabled opponents of EEO regulation to manufacture the following issue for the court: "Whether the FCC, by adopting Form 395 in a proceeding aimed at discrimination-prevention, has inherently embraced the improper use of Form 395 and thereby incentivized discrimination." The Commission should not fall into this obvious trap.

Finally, in our Comments, we proposed, as a further compromise, that the Commission keep station-attributed reports confidential for three years. 97/ The STBAs dismiss this as "mere subterfuge" because "[t]hree years of confidentiality simply does not protect against the imposition of such unconstitutional pressure." 98/ The STBAs do not explain why this compromise is inadequate, however. To our knowledge, no petition to deny has ever been filed whose allegations of EEO misconduct invoked a statistical record that was more than two years stale. The STBAs cite no such case either.

Thus, we have proposed three levels of protection against any supposed "unconstitutional pressure" --

1. the Commission should not use Form 395 data to evaluate recruitment, and it would keep its repeated promises to dismiss petitions to deny urging such evaluations;

2. the Form 395 issue should be resolved in a proceeding divorced from EEO recruitment issues, so that not a single poorly informed broadcaster could form the misimpression that Form 395 is linked to evaluation of recruitment efforts; and

3. the Form 395 data should be withheld for three years in a manner that would eliminate its usefulness except in intentional discrimination cases.

97/ EEO Supporters Comments, pp. 131-135.

98/ STBAs Reply Comments, p. 29.

That ought to be enough. Anything more would cross the line into protection of intentional discriminators. That would be a step into a different realm of unconstitutionality, 99/ and offense to the Act, 100/ that we trust the Commission would never take. It is not a proper purpose of government to conceal information that could help establish serious violations of law.

7. Texas TV Stations Were Not Oppressed By LULAC's 1993 Challenge To Systemic EEO Noncompliance

The constructive tone of the June 24, 2002 EEO hearing was interrupted by the following passage in Texas Association of Broadcasters' Executive Director Ann Arnold's testimony. Referring specifically to a group of Texas cases involved "in an enforcement action in 1994", Ms. Arnold testified that:

99/ See EEO Supporters 1999 Comments, Vol. II, pp. 117-134 (explaining why the Commission lacks discretion to refuse to remedy the consequences of its own efforts to facilitate discrimination.)

100/ As noted above, Form 395 is required by Section 334. See p. 28 n. 89 supra. Furthermore, Section 151 of the Act created the Commission, inter alia, "so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" (emphasis added to include new language contained in the Telecommunications Act of 1996). On its face, Section 151 is non-self-executing; consequently, Congress expects the Commission to write rules implementing it.

> the EEO rules you promulgate are misused to abuse, threaten and blackmail radio and television stations....Individual broadcasters are actually afraid to complain to you about it, but they tell me about the calls they get asking for thousands of dollars for preparation of "minority recruitment plans" for their station in exchange for dropping protests of their license renewals....Broadcasters tell me and sometimes they even tell white male applicants that they cannot hire anyone but a minority. Rightly or wrongly, in the face of the regulatory environment created by the FCC regulations the broadcasters believe they must find a minority for an opening, especially if the economic downturn has caused them to downsize or have fewer openings. I have agonized truthfully at the prospect that these broadcasters will be caught in a Catch-22 situation, a trap, and find themselves sued for reverse discrimination. 101/

Chairman Powell's response was on point: "if they are false and unsubstantiated, there is nothing to fear, and people shouldn't pay." 102/

The NAB went even further, implying that the reason the civil rights organizations want EEO rules is so they can bring civil rights litigation -- as though that is something anyone would actually enjoy having to do. 103/

101/ Tr. pp. 41-43.

102/ Tr. 56.

103/ See NAB Reply Comments, p. 3 (suggesting that the civil rights organizations "seek changes to the Commission's proposed rule that would facilitate their examination of broadcast stations' workforce compositions for purposes of subsequently filing challenges to license renewal applications of stations whose staffs they deem insufficiently diverse [so the Commission will] impose on broadcasters the exact 'pressure' to focus their recruitment efforts on minorities and women proscribed by the court in Lutheran Church and reinforced in [MD/DC/DE Broadcasters]."). The fact is that for 150 years, ever since post-Civil War reconstruction, civil rights organizations have sought strong civil rights laws in order to reduce the necessity of having to bring lawsuits. When norms are strong and are clear, few cases ever need to be brought, which would be delightful.

The TAB was employing a tactic familiar to every student of negative political advertising:

1. Dredge up some ancient matter;

2. Pick a matter that nobody felt aggrieved enough about to raise at the time it happened;

3. Provide enough information to identify who is being attacked, but do not actually utter the name of the party being attacked when doing so would plainly show that the allegations are ridiculous;

4. Give only unsourced, undocumented "information", naming no names and providing not one verifiable fact;

5. State that the accusers are fearful and intimidated, notwithstanding that they are well represented by experienced counsel, suffered no cognizable harm and have never been fearful in any other context; and finally,

6. Make allegations that are objectively untrue.

Owing to Rule 11, anti-greenmail rules and fear of retaliation -- not to mention the underlying integrity of most civil rights organizations -- only a tiny fraction of civil rights litigation in any forum is abusive. Yet the TAB, apparently recognizing that it has no meritorious arguments, has desperately started to whisper that civil rights work is nothing more than "blackmail." This isn't new: in their day, similar allegations were raised against and rebutted by Frederick Douglass, Susan B. Anthony, Martin Luther King, Cesar Chavez, and Thurgood Marshall.

As set out below, the very case in Texas that was mentioned in the en banc hearing is actually an instructive example of how EEO litigation is supposed to work. We have chosen to set out the history of that litigation here in order to help the Commission understand how responsible petitioners to deny bring EEO allegations to the agency's attention.

The "enforcement action in 1994" in Texas that Ms. Arnold was referring to was the petition to deny the license renewals of 16 Texas television stations, filed on July 1, 1993 by the League of United Latin American Citizens ("LULAC"). LULAC is the oldest and largest Hispanic civil rights organization in Texas and in the nation. LULAC, one of the EEO Supporters, has provided a declaration of its communications counsel, Eduardo Peña, Esq. (Exhibit 4 hereto) describing the litigation. Mr. Peña states:

I am the communications counsel for the League of United Latin American Citizens (LULAC). Previously, I served as the National President of LULAC and, before that, as Director of Compliance for the EEOC for ten years. I have practiced civil rights law for nearly four decades, and I formerly was a part owner of a television station that was affiliated with the ABC and later the Telemundo network. Over the past twenty years, I have participated in many FCC adjudicative and rulemaking proceedings. In 1993, I was a partner in the Silver Spring, Maryland firm Alexander, Gebhardt, Aponte and Marks.

With the authorization of and on behalf of LULAC, I am responding to Texas Association of Broadcasters (TAB) Executive Director Ann Arnold's suggestion, in her June 24, 2002 testimony at the FCC's en banc EEO hearing, that there was some irregularity in LULAC's challenge to various Texas television stations' license renewals in 1993. The allegation that LULAC would ever be involved in some kind of oppressive behavior is disappointing, insulting and absolutely wrong.

LULAC is keenly aware of the importance of television in focusing public attention on issues facing minority groups, as the Kerner Report documented and explained in 1968. National television coverage of the African American civil rights struggle in the south contributed profoundly to the success of the movement; yet the failure of southern television stations to discuss civil rights on the air did much to delay African Americans' attainment of the most elementary attributes of citizenship. Likewise, in Texas in 1993, the near-absence of Hispanics in broadcast journalism and public affairs staffs presented an impediment to having our issues addressed on the air. At LULAC's national conventions in the early 1990s, speakers and panelists complained bitterly that there were few people inside the television stations who were familiar with our issues, or who knew the people who were driving those issues. Thus, news directors and assignment editors tended to cover other matters with which they were already familiar or with which they could empathize.

For years, we had heard too many accounts from well qualified Hispanics that they could not secure employment at the Anglo stations. Few complaints were filed, since by filing such a complaint against an employer in a close-knit industry a person often throws his career out the window by becoming labeled a "troublemaker."

LULAC was fed up with this, and it decided to do something about it.

LULAC also recognized that while the FCC had had EEO rules since 1969, its enforcement staff relied almost entirely on complaints from members of the public to alert the Commission to problems with particular licensees. Thus, LULAC felt it was our duty to report EEO violations to the Commission.

LULAC is not a stranger to the Texas Association of Broadcasters (TAB). We are their neighbors -- indeed, we long predated their existence. LULAC was founded in Texas in 1929, around the time when television was invented and five years before the FCC was created. Some LULAC members are broadcasters in Texas. In 1993, any broadcaster could have called our national headquarters, or our local representatives, to reach out to us or to share their concerns with anything we did.

LULAC is not some obscure "concerned citizens" group created to challenge a license and seldom lasting longer than the FCC's ruling. It is as conservative and mainstream as an organization created to defend the civil rights of Americans can be. When LULAC brings EEO litigation before the FCC, its road map is the same as that followed by the Office of Communication of the United Church of Christ and by the NAACP. In particular:

- we target only apparent "bad actors", irrespective of irrelevant factors like the parent company's size or a pending sale of the company;
- we seek nothing for LULAC itself;
- we never seek to oppress or embarrass our opponents; and
- in the event of a settlement, we always put all the terms in writing and document any reimbursable expenses carefully according to FCC standards.

LULAC has operated for eight decades under the highest standards of ethics. In Texas and throughout the United States, we have won renown for our diligent and aggressive battles against discrimination and for equal opportunity. In Texas, LULAC lawsuits brought about the desegregation of the "Mexican Schools", the elimination of the Poll Tax and the participation of Mexican Americans on juries. In California and Texas, LULAC lawsuits ended the prevalent practice of assigning Hispanic students into classes for the retarded. More recently, LULAC lawsuits against the State of Texas compelled the University system and the Texas Highway Commission to correct their longstanding practices of neglecting the educational and economic development needs of South Texas and the counties along the border, where almost half of the Hispanics in Texas reside.

Not all of LULAC's effort to improve the quality of life in Texas are achieved through litigation. LULAC councils throughout the state help to feed the hungry, and to clothe and shelter the poor. We work tirelessly to improve the educational system in the state. LULAC programs help students stay in school, graduate from high school and continue into college and graduate school. Since 1929, one of the principal efforts of LULAC councils has been to provide encouragement and support through the most extensive scholarship program available to Hispanic students in Texas.

Surely the Texas Association of Broadcasters knew something about these and many other efforts by LULAC members to help make Texas a better place to live. Our efforts in the broadcasting industry, which influences so much in our society, are no less important.

Understandably, the targets of LULAC's battles are not always enamored of everything LULAC does. No one wants to be the subject of a civil rights action, even if such an action is well deserved.

As a group, Texas broadcasters' record of Hispanic employment is so weak that only the presence of systemic discrimination explains it. In 1992, FCC Form 395 data disclosed that there were 4,525 full time high pay (management, sales, professional and engineering) employees of Texas television stations, of whom 781 (17.3%) were Hispanic. However, when the Spanish language stations were omitted, these numbers become rather shocking: 513 out of 4,150 (12.4%) were Hispanic. In the 1990 Census, 25.5% of the Texas population was Hispanic. LULAC recognized that this wide a disparity could not be explained except as the fruit of intentional discrimination.

With 117 television stations in the state in 1993, our due diligence effort had to be very comprehensive. In preparing for litigation, we had two objectives: first, do not put EEO compliers through the travails of litigation; second, do not allow EEO noncompliers to escape accountability.

Thus, we reviewed the EEO performance and EEO programs of every television station in the state -- an enormous, tedious and very time-consuming task. Local LULAC councils, whose officers are volunteers, possessed years of collective knowledge of the stations' operations. They often heard from Hispanics who worked in the media and knew who was, and who was not, providing equal opportunity. In our due diligence, we usually found Form 395 data to be useful in mitigation, while the stations' 1988 and 1993 EEO programs (Form 396) often provided evidence in corroboration. In at least two instances, however, the Form 395 data was so extreme that it tended to support inferences of intentional discrimination that we had drawn from other evidence we possessed.

As a former Director of Compliance of the EEOC and a civil rights lawyer throughout my professional life, I can affirm that this is what happens normally in planning for EEO litigation.

As a result of our initial due diligence, we divided the television stations in Texas into four categories:

(1) those that we knew were nondiscriminators and EEO compliers

(2) those for which we could not form an opinion as to whether they were nondiscriminators and EEO compliers

(3) those we believed to be neglectful of their EEO compliance obligations, although we did not believe them to be intentional discriminators

(4) those we believed were deliberate EEO noncompliers and, in most cases, deliberate discriminators.

These four categories are normal for civil rights litigation. As I noted above, LULAC did not focus on the parent company's size, whether the station was likely to be sold, or any other irrelevant factors. Instead, LULAC and other mainstream civil rights organizations focus only on stations that appear to be EEO noncompliers, to the exclusion of extraneous matters.

Of the 117 television stations in Texas in 1993, 98 were in category (1) or (2); that is, there were no grounds or insufficient grounds to question their FCC EEO bonafides.

Another three stations were in category (3). We did not challenge these stations' renewal applications. Instead, we wrote each of them a letter stating that they had been excluded from the petition to deny, but encouraging them to be more attentive to their EEO responsibilities. We did not ask them to do anything more than that.

Sixteen of the stations were in category (4), and we challenged the renewal applications of each of them. These stations were 13.7% of the 117 television stations in Texas. The stations were located in the following markets: College Station, Corpus Christi, Dallas-Fort Worth, El Paso, Houston, Lubbock, San Angelo, San Antonio, Sweetwater and Wichita Falls,

Much has been made of the role of Form 395 data in petitions to deny. As noted earlier, in at least two instances, the Form 395 statistics were so extreme that they added to inferences of discrimination we had derived from other evidence. However, the 1993 percentages of minorities among the top four category employees of the stations subject to our petition to deny ranged from 0% to 46%, with a median of 26%. These statistics -- which may surprise those who think citizen groups file petitions to deny by just counting heads -- reflects the fact that of all of the factors entering into an evaluation of whether discrimination may have occurred, overall employment statistics are only of secondary value.

The Petition was 35 pages in length, not counting exhibits.

We were careful not to "overplead." For example, we noted in the petition that one of the stations did not seem to be discriminating, but seemed instead to be operating outside the EEO rule through inattentiveness and neglect. Thus, as to that station, we sought only reporting conditions rather than a hearing, because reporting conditions seemed commensurate with the scale of its offense. (Later, when we found a database error in our petition, we withdrew it voluntarily as to that station.

The FCC's staff, finding that a prima facie case of discrimination had been made out, conducted investigations of the allegations raised against six of the stations.

The dispositions of the stations' applications were as follows:

- Two cases were resolved with admonishments.
- Five cases were settled; these settlements were each approved by the FCC, and sanctions were not imposed.
- One case was settled, with Commission approval, but the Commission also imposed a conditional renewal and a forfeiture.
- One rather dramatic case resulted in a short term conditional renewal with a forfeiture.
- Six cases resulted in unconditional renewals.
- As noted above, one case was withdrawn by LULAC on its own motion.

These outcomes are normal for civil rights litigation. By comparison, the EEOC recently announced that 27% of private plaintiffs' workplace bias suits resulted in a recovery. See EEOC Litigation Report, 1997-2001 (August 13, 2002). As shown above, four out of 16 (25%) of the cases we brought resulted in FCC findings that the licensees' EEO performance had fallen short of what was expected.

Like almost every nonprofit organization, LULAC is open to settlement except in extreme cases. Sometimes, the parties' objectives can be achieved more efficiently through settlement than through continued litigation. A rule of thumb is that roughly 95% of all civil litigation eventually settles. At the FCC, only about 30% of EEO litigation settles. As shown above, of the 16 cases we brought in 1993 in Texas, six (38%) settled.

When we entered into settlement discussions, we did not propose anything the FCC had never before approved or was unlikely to approve. Nor, obviously, did we threaten any licensee with retribution if it did not reach agreement with us.

In approving these and all other settlements of EEO litigation, the Commission evaluates the merits of the allegations, as it must do under Section 309(d)(2) of the Communications Act. In all cases, the licensees were represented by experienced FCC counsel, and these lawyers did not hesitate to call me or my co-counsel, David Honig, if they had any questions or wanted to discuss settlement.

The settlements, when they occurred, sometimes were the product of LULAC's approaching the licensee, and sometimes were the product of the licensee approaching LULAC. As typically happens in any kind of litigation, these discussions occurred at "decision points" -- i.e., when a pleading cycle ended, or when the Bureau had just issued a decision. In two instances, settlement discussions did not result in settlement, but at no time did opposing counsel (who we knew very well) ever advise us that our settlement proposals were inappropriate.

When a licensee sought settlement discussions, or agreed with us that settlement would be appropriate, the first step was for us to send a settlement proposal to the licensee's counsel upon his request for one. Our starting point was a draft form I helped develop that amplified on FCC Form 396 while also including elements of EEO consent decrees commonly used by the EEOC and by litigants in EEOC matters for decades. Due to often intense negotiations, this form typically went through numerous revisions, iterations, and adjustments to fit the particular circumstances of each case and the needs and abilities of each licensee. The settlements we reached typically included substantive commitments which provided that the station would, e.g.,

- notify local LULAC representatives and other organizations whenever job vacancies occur, and such vacancies are not to be filled through promotion from within;

- operate a student internship program at the station, exposing students to various substantive areas of competency, such as sales, research, programming, production and promotion; and

- meet regularly with local LULAC representatives for nonbinding dialogue concerning recruitment sources, training, internship opportunities, staff diversity (particularly in news), means by which Hispanic organizations in the station's service area might participate in the station's programming, and opportunities for Hispanic businesses to provide goods and services to the station.

These provisions are consistent with sound EEO practice and LULAC regards them as serving the public interest. The Commission has never hesitated to approve voluntary agreements with these kinds of provisions.

Ms. Arnold alleges in her June 24, 2002 en banc hearing testimony that what was being sought, apparently by LULAC, was "thousands of dollars for preparation of 'minority recruitment plans' for their station in exchange for dropping protests of their license renewals." As shown below, that allegation is not true.

Ms. Arnold may not have meant to imply that this money would go to LULAC itself; actually, LULAC never sought nor received a penny for itself. Under the FCC's anti-greenmail rules, LULAC could have, and only did, seek a portion of the value of its documented legal expenses. Those expenses had to be reviewed and approved by the FCC's staff before any compensation could be made.

The preparation of a "minority recruitment plan" was an essential element of any settlement, obviously. But drafting this straightforward document and negotiating its terms with opposing counsel (often requiring three or four iterations) hardly represented all (or even a majority) of the legal work done on LULAC's behalf in the litigation. Under Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972) and Agreements between Broadcast Licensees and the Public, 58 FCC2d 1129 (1975), LULAC was permitted to seek reimbursement of a portion of its fees and costs in the entire case -- including due diligence and pleadings.

All settlement terms were always reduced to writing and submitted to the Commission for its approval. There were absolutely no side deals nor requests for same. Each case that was settled was submitted for Commission review through a joint petition for approval signed by both sides' counsel, and each case involving a fee reimbursement was supported by a detailed declaration of counsel, using the guidelines developed by (retired) FCC EEO Branch Chief Glenn Wolfe over twenty years ago.

Most critically, the FCC approved each settlement without modifications and without requesting additional documentation. The total amount of reimbursable fees would not pay a half-year's salary for a single broadcast manager. This kind of litigation is hardly a profit center for a law firm, which helps explain why so few lawyers bother with it.

Respectfully, if the purpose of a petition to deny is to call material facts to the Commission's attention, we fulfilled that purpose reasonably well. The facts we called to the Commission's attention are the kind of facts any agency with civil rights enforcement authority would want to know.

Finally, Ms. Arnold alleges in her en banc hearing testimony that broadcasters "tell me and sometimes they even tell white male applicants that they cannot hire anyone but a minority." Although I have come across many peculiar utterances in my years as an EEOC official and a civil rights lawyer, the possibility that more than one or two broadcasters ever said out loud so outrageous a thing as "I cannot hire anyone but a minority" seems implausible to me. A television station is almost always represented by experienced communications counsel and local counsel. These lawyers would have advised their clients that the station's FCC license would be on the line if a broadcast manager openly proclaimed that his station engaged in race discrimination.

As a former partner in a television station licensee, I know, and I'm sure every television station owner knows, that the FCC does not tolerate "reverse discrimination." On the other hand, discrimination against minorities and women, done covertly, happens far more frequently than most Americans would like to acknowledge.

* * * * *

Thus, LULAC clearly did the following:

1. It chose its targets fairly.

2. It did nothing to oppress or embarrass its opponents in the litigation.

3. It supported its allegations with relevant and material evidence.

4. It neither proposed, nor did it enter into any improper settlements.

The Commission has wisely chosen to rely on the good judgment of local citizens, rather than on its own police powers, in bringing allegations of certain kinds of misconduct to its attention -- including violations of the political broadcasting, indecency, children's TV and EEO rules. LULAC's 1993 Texas TV petition was a good example of why the Commission's trust in the public's good judgment is well placed. 104/

Unfortunately, for some, one petition to deny is one too many; the four lawyers who devote a portion of their FCC practices to civil rights litigation are four lawyers too many; and the participation before the FCC even of moderate, respected, decades-old national organizations like LULAC is too much to bear. Everyone is entitled to her opinion, but EEO opponents must not be allowed to use the record of this proceeding to smear the standard bearers of nondiscrimination.

* * * * *

Conclusion

Two concluding notes: first, we are filing for the record and providing to the commissioners and to the Chief of the Bureau, copies of two documents from the Office of Communication, Inc., United Church of Christ: Kay Mills, Changing Channels: The Civil Rights Case That Changed Television, Civil Rights Forum on Communications Policy (2000) (discussing the WLBT-TV, Jackson, MS case that led to Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I") and Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) ("UCC II")), and "OC Inc. - The Untold Story," Videotape, 5/30/02, by the United Church of Christ (2002) (providing a history of the Church's efforts since 1955 to integrate the broadcasting industry).

104/ See MMTC, "FCC EEO Enforcement, 1994-1997" (1999) (discussed in EEO Supporters Comments, p. 63 n. 147 (reporting that for 251 EEO enforcement rulings from 1994-1997, in 62% of these cases, involving 155 licenses, the Commission found that the licensee had fallen short of the agency's minimal standards for effective EEO programs.) Virtually all of these cases were brought by listeners and viewers, usually represented by counsel who worked without compensation. See Testimony of Rev. Robert Chase, Executive Director, Office of Communication, Inc., United Church of Christ, Tr. 95.

Second and finally, we note that the Commission has initiated a review of its broadcast ownership rules. 105/ Traditionally, when more consolidation is permitted, efficiencies in the consolidated operations result in staff downsizing. Further, employees with the least seniority tend to be the first to go. In broadcasting, discrimination has made minorities and women the new entrants in the business -- they tend to enjoy far less seniority than whites and men. We do not wish to prejudge the ownership proceeding. However, everything the Commission does is interconnected with everything else it does. It would be a shame if the Commission imperils the careers of new entrants with one hand, and simultaneously fails to protect these new entrants from discrimination with the other hand. The contrapositive is also true: if the Commission does the best it can legally do to protect minorities and women from discrimination, it will be on far firmer ground if it elects to take steps that could result in the layoffs that follow in the wake of consolidation.

Sincerely,

David Honig
Counsel for EEO Supporters

cc: Hon. Michael Powell
Hon. Kathleen Abernathy
Hon. Michael Copps
Hon. Kevin Martin
Kenneth Ferree, Esq.
Roy J. Stewart, Esq.
Deborah E. Klein, Esq.
Mary Beth Murphy, Esq.
Jamila Bess Johnson, Esq.
Lewis Pulley, Esq.
Roy W. Boyce, Esq.
Susan Eid, Esq.
Jordan Goldstein, Esq.
Stacy Robinson, Esq.
Alexis Johns, Esq.
Catherine Bohigian, Esq.
Jane Mago, Esq.
Michele Ellison, Esq.
Joel Kaufman, Esq.
Marilyn Sonn, Esq.
Louis Peraerz, Esq.
Richard Zaragoza, Esq.
Henry L. Baumann, Esq.

105/ 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NPRM), MB Docket No. 02-277, FCC 02-249 (released September 23, 2002).